Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	)	WT Docket No. 13-238
	)	
Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59
	)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	)	RM-11688 (terminated)
	)	
2012 Biennial Review of Telecommunications Regulations	)	WT Docket No. 13-32

COMMENTS OF VALLEY CENTER MUNICIPAL WATER DISTRICT

The Valley Center Municipal Water District ("District"), a California special district,[1] hereby submits comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. The District urges the Commission to affirm its tentative conclusion that Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012[2] only affects state, local, and tribal land-use regulation—not proprietary or contractual activity.[3]

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[1] The District is authorized under the California Municipal Water District Law of 1911. Cal. Water Code §§ 71000 *et seq*. Located in Valley Center, California, the District has constructed a water system consisting of 42 reservoirs, 421 acre feet of water storage capacity, 291 miles of water lines, 26 pump stations, 7 aqueduct connections, 1,612 acre feet of emergency water storage, and a total pump capacity of 19,940 horsepower. The system distributes water imported into the Southern California region to properties across the District's 100 square mile service area. The District also provides wastewater treatment and reclamation services for approximately 2,750 customers. The District is governed by a five-member Board of Directors selected by voters to serve four-year terms.

[2] 47 U.S.C. § 1455(a).

[3] NPRM ¶¶ 94, 129.

Many state agencies or instrumentalities including the District have no zoning-type authority at all, and instead only lease or license space to wireless providers and others as owners of valuable public property. Only this approach honors well-established legal and constitutional principles. A contrary approach—mandating that if the District enters into a lease or license for a site, it must also approve modifications to that site and must lease or license the site to collocators—would undermine the Commission's goal of accelerating broadband deployment. It would make it very difficult for the District, and others like it, to continue to license or lease space to wireless-service companies at all.

DISCUSSION

I. THE COMMISSION SHOULD AFFIRM ITS TENTATIVE CONCLUSION THAT SECTION 6409(A) DOES NOT APPLY TO PROPRIETARY ACTIONS.

Section 6409(a) provides that notwithstanding other provisions of law, a State or local government "may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[4] The FCC's NPRM asks how Section 6409(a) applies to proprietary activities, and proposes to interpret the statute to apply "only to State and local government acting in their role as land use regulators" and not "to such entities acting in their capacities as property owners."[5]

The FCC's tentative conclusion—that Section 6409(a) should not apply to the acts of property owners like the District—is correct as both a matter of law and policy. While Section 6409(a) at first blush appears broad enough to reach any activity of a state or local government or agency, the essence of the provision ("may not deny") can only be understood as preemptive.

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[4] 47 U.S.C. § 1455(a).

[5] NPRM at ¶ 129.

The phrase "request" in Section 6409(a) suggests that what is at issue is the response to an application for regulatory permission.

As a legal matter, federal preemption applies only to "state regulation," not to proprietary actions.[6] Courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate. The former is not subject to preemption; the latter is."[7] Just as the Telecommunications Act "does not preempt nonregulatory decisions of a state or locality acting in its proprietary capacity,"[8] neither does Section 6409(a). Indeed, dictating how the District (or any governmental entity) must contract for the use of its property would raise serious constitutional issues under the Takings Clause and the Tenth Amendment.

The FCC's tentative conclusion is also correct as a matter of policy, as the District's own experience demonstrates. The District operates its property—the tanks, reservoirs, and maintenance yards—effectively as a private property owner would. This is consistent with its powers under California law: the District has the power to "[h]old, use, enjoy, lease or dispose of real and personal property of every kind."[9] To maximize the use of its facilities for beneficial purposes, the District leases and licenses the use of property which it owns in fee to wireless communications service providers. Currently, the District has 10 communication site agreements

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[6] *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993).

[7] *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000).

[8] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993) ("[P]re-emption doctrines apply only to state regulation"); *Omnipoint Communications v. City of Huntington Beach*, No. 10-56877 (9th Cir. Dec. 11, 2013).

[9] Cal. Water Code § 71690(b).

for the use of portions of its reservoir sites, and it is considering entering into additional agreements. The District uses the funds that it collects through these agreements to lower customer rates or to improve and maintain infrastructure. But while the leasing and licensing of space for wireless telecommunications facilities boosts the District's general revenues, it is a purely ancillary activity that cannot disrupt the District's primary purpose—water, wastewater treatment, and reclamation services. The District's water system distributes water imported into the Southern California region to properties across the District's 100 square mile service area. The District must protect the water supply against security threats. It uses sensors, gates, lighting, and a host of other security measures to protect District property. And of course, the District must ensure that it can easily access its facilities, and ensure that those facilities are maintained in working order. For safety, operational, and other reasons, the District therefore must strictly control the facilities that can be placed at any location, and it must do so on a case-by-case basis.

If collocation were automatic or mandatory per an FCC rule, the District's incentive to continue to lease or license its property would disappear. The financial benefits are not great in comparison to its total operating and non-operating revenues. The risks to the District's primary operations, however, are significant. Each facility added to District property (including collocated facilities) is accompanied by additional ground equipment and personnel that increase the risk of disruption to the District's principal work. The District does not have the staff or other resources available to address the issues that could arise were it required to allow the sort of additions to plant contemplated by the FCC's proposed rules. For example, the District has elected not to permit any wireless communications facilities to be physically attached to the District's facilities. But if an initial grant of access can open District property to other facilities

that the District has not reviewed and approved, the District likely cannot afford to continue to grant access going forward.

In sum, the Commission should affirm its tentative conclusion that Section 6409(a) does not apply to proprietary actions. Interfering with the District's decisions about how to lease or license its property would not only defy well-established legal and constitutional principles. It would also undermine the Commission's goals by making it unlikely that Valley Center would continue to open its property to wireless-service companies at all.

II. THE COMMISSION DOES NOT NEED TO DEVELOP ADDITIONAL REGULATIONS IN THIS AREA.

The FCC also seeks comment on "how to ensure in which capacity governmental action is requested and in which capacity a governmental entity is acting" and "whether we need to address how Section 6409(a) applies to requests seeking a government's approval in both capacities."[10] The Commission asks: "[W]ould Section 6409(a) impose no limits on such a landlord's ability to refuse or delay action on a collocation request?"[11]

Section 6409 imposes no limits on a landlord's rights with respect to collocation for reasons suggested above. A provider who wishes to obtain collocation rights can always seek to do so when negotiating the lease or license – and can address rights to modify or remove facilities at the same time. These are not unusual issues, unique to the wireless industry: many lessees may need to modify, remove, or add to facilities during a lease or license term. The issues can be addressed in the same manner other lessees address them; and indeed, must be addressed that way, as changes in agreements in mid-term may require renegotiation of basic terms, like compensation terms.

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[10] NPRM at ¶ 129.

[11] *Id.*

The Commission likewise does not need to develop rules to ensure in which capacity a government is acting. The simple answer to the Commission's question is that when a government is leasing its property like a private landlord, it is acting in a proprietary capacity, even if the property is also subject to land-use approvals.

This is certainly true for the District. It has no regulatory authority over land use; and has no zoning powers, and is thus necessarily exercising authority just as a private landowner would, even if facilities placed on its property are subject to land-use review by other California authorities.[12] Hard cases about the capacity in which a government entity is operating—should any arise—are best addressed by the courts, in light of state law, which often defines what control a government may exercise over particular property, and in what capacity it may act.

Attempting to develop a federal rule to distinguish between the proprietary and regulatory functions serves no end and is risky. The Commission certainly cannot draw a line based on the type of conditions imposed. While the District does not have any zoning authority, it may establish conditions very similar to those that might be established through a land-use process. For example, if a provider wishes to place an antenna in a parking lot controlled by the District, the District may want to control the size and appearance for its own business reasons, and may also include conditions that ensure that the facility is safe, and operated in a manner that creates no liability for the District. The mere fact that there are business reasons for imposing such conditions does not transform the conditions into land-use regulation, or bring them within the scope of Section 6409 and the Commission's authority. Indeed, the ability to impose such conditions, as suggested above, is critical to the District's continued interest in leasing property to wireless providers.

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[12] Cal. Gov't Code § 53091.

CONCLUSION

The Commission should affirm its tentative conclusion that Section 6409(a) only affects state, local, and tribal land-use regulation—not proprietary or contractual activity. The Commission should refrain from adopting additional regulations in this area.

Respectfully submitted,

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Valley Center Municipal Water District

December 23, 2013